(2)

No. 90-114

Supreme Court, U.S.
FILED
SEP 17 1990
JOSEPH SPANIOL, JR.
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1990

CONSOLIDATION COAL COMPANY, PETITIONER

v.

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR, AND ALBERT C. DAYTON

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT

KENNETH W. STARR
Solicitor General

DAVID L. SHAPIRO
Deputy Solicitor General

CHRISTOPHER J. WRIGHT
Assistant to the Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 514-2217

ROBERT P. DAVIS
Solicitor of Labor

ALLEN H. FELDMAN
Associate Solicitor

EDWARD D. SIEGER
Attorney
Department of Labor
Washington, D.C. 20210

BEST AVAILABLE COPY

QUESTIONS PRESENTED

1. Whether the rebuttal provisions of a Department of Labor regulation satisfy Section 402(f)(2) of the Black Lung Benefits Act of 1972, which requires the Department to apply "[c]riteria * * * not [illegible] more restrictive" than criteria applied during an earlier phase of the black lung program.

2. Whether the statute, if construed to invalidate the Department's rebuttal provisions, violates the constitutional guarantee of due process.

BEST AVAILABLE COPY

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Argument	5
Conclusion	7

TABLE OF AUTHORITIES

Cases:

- *Bethenergy Mines, Inc.* v. *Director*, OWCP, 890 F.2d 1295 (3d Cir. 1989), petition for cert. pending, No. 89-1714 — 5, 7
- *Pittston Coal Group* v. *Sebben*, 488 U.S. 105 (1988) — 2
- *Public Citizen* v. *United States Dep't of Justice*, 109 S. Ct. 2558 (1989) — 6
- *Taylor* v. *Clinchfield Coal Co.*, 895 F.2d 178 (4th Cir. 1990), petition for cert. pending, No. 90-113 — 4

Statutes and regulations:

- Black Lung Benefits Act of 1972, 30 U.S.C. 901 *et seq.* — 2
  - § 402(f)(2), 30 U.S.C. 902(f)(2) — 2, 4, 5, 6
- 20 C.F.R.:
  - Section 410.490 — 2
  - Section 410.490(b)(1) — 2
  - Section 410.490(c)(1) — 2
  - Section 410.490(c)(2) — 2
  - Section 727.203 — 2
  - Section 727.203(a)(1)-(5) — 2
  - Section 727.203(b)(1) — 2
  - Section 727.203(b)(2) — 2
  - Section 727.203(b)(3) — 3
  - Section 727.203(b)(4) — 3

Miscellaneous:

- R. Stern, E. Gressman & S. Shapiro, *Supreme Court Practice* (6th ed. 1986) — 5

In the Supreme Court of the United States

OCTOBER TERM, 1990

No. 90-114

CONSOLIDATION COAL COMPANY, PETITIONER

v.

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR, AND ALBERT C. DAYTON

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 2-7) is reported at 895 F.2d 173. The decision and order of the Benefits Review Board (Pet. App. 8-13) and the decision and order of the administrative law judge (Pet. App. 14a-27a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on February 5, 1990. The order denying the petition for rehearing was entered on April 20, 1990 (Pet. App. 1). The petition for a writ of certiorari was filed on July 17, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Black Lung Benefits Act of 1972, 30 U.S.C. 901 *et seq.*, provides benefits to former coal miners and their survivors for total disability or death due to pneumoconiosis. Disability claims filed by June 30, 1973, were considered by the Department of Health, Education, and Welfare (HEW) under regulations that included a presumption of entitlement to benefits (20 C.F.R. 410.490) that was available to certain claimants. Claims filed after that date are considered by the Department of Labor. Claims filed with the Department of Labor before April 1, 1980, are subject to Section 402(f)(2) of the statute, 30 U.S.C. 902(f)(2), which provides that the "[c]riteria" applied to those claims "shall not be more restrictive than the criteria applicable to a claim" adjudicated by HEW. See *Pittston Coal Group* v. *Sebben*, 488 U.S. 105, 108-111 (1988).

In response to Section 402(f)(2), Labor promulgated its own presumption regulation, 20 C.F.R. 727.203. While there were only two ways to invoke HEW's presumption (see 20 C.F.R. 410.490(b)(1)), there are five ways to invoke Labor's presumption. See 20 C.F.R. 727.203(a)(1)-(5). Once the presumption had been invoked, HEW's regulation specified that the presumption could be rebutted (1) by proving that the miner was doing his usual coal mine work or comparable work, or (2) by proving that the miner was capable of doing such work. 20 C.F.R. 410.490(c)(1) and (2). In contrast, Labor's regulation specifies four rebuttal methods. The first two generally correspond to the two specified HEW methods. 20 C.F.R. 727.203(b)(1) and (2). The third and fourth Labor methods allow a party contesting entitlement to defeat a claim either (3) by proving that the disability or death of the miner did not arise in whole or in part from coal mine employment or (4) by proving that the miner does not or did not have pneumoconiosis. 20 C.F.R. 727.203(b)(3) and (4).

2. In 1979, after 17 years of coal mining, Albert Dayton applied for black lung benefits. Pet. App. 3. A deputy commissioner in the Department of Labor's Office of Workers' Compensation Programs (OWCP) initially found him eligible for benefits, but Consolidation Coal Company, the responsible coal mine operator, contested eligibility and obtained a hearing before an administrative law judge. *Ibid.* The ALJ found that Dayton had properly invoked the presumption of eligibility for benefits based on his 17 years of coal mining and on ventilatory test scores showing a chronic pulmonary condition. *Id.* at 15, 20.

The ALJ also concluded, however, that Consolidation Coal had rebutted the presumption under Labor's second rebuttal method by proving that Dayton's pulmonary impairment was not totally disabling. Pet. App. 20-24. In addition the ALJ concluded that the medical evidence showed that Dayton did not have pneumoconiosis, so that the presumption was also rebutted under Labor's fourth method. *Id.* at 24-26. Accordingly, the ALJ denied Dayton's application for benefits. *Id.* at 27.

The Benefits Review Board affirmed. Pet. App. 8a-13a. Like the ALJ, the Board concluded that the medical evidence showed that Dayton's pulmonary condition was unrelated to coal dust exposure, but was instead related to his smoking history and other ailments. It accordingly held that the employer had rebutted the presumption under the fourth method.

Id. at 11-12. The conclusion that Dayton did not have pneumoconiosis, the Board added, would justify rebuttal under HEW's regulation as well. *Id.* at 12 n.2. The Board did not decide whether the ALJ had correctly concluded that the employer had rebutted the presumption under Labor's second method. *Id.* at 10 n.1.

3. The court of appeals reversed. Pet. App. 2a-7a. Relying on its decision in *Taylor* v. *Clinchfield Coal Co.*, 895 F.2d 178 (4th Cir. 1990), petition for cert. pending, No. 90-113 (filed July 17, 1990), the court held that Section 402(f)(2) required Dayton's claim to be adjudicated "under the less restrictive rebuttal standards" of HEW's regulation. Pet. App. 5. Under HEW's standards, the court stated, Labor's fourth method "should not have been available to the coal operator." *Id.* at 6. Thus, in the court's view, the finding that Dayton does not have pneumoconiosis "is superfluous and has no bearing on the case." *Id.* at 7 n.*. The court recognized that this result posed an "interesting" due process question, but decided not to consider the constitutional implications of its decision because only the Director, Office of Workers' Compensation Programs, and not the operator had raised the issue. *Id.* at 6.

ARGUMENT

We agree with petitioner that the court of appeals erred. The black lung program provides benefits to coal miners who are totally disabled due to pneumoconiosis, and neither HEW nor the Department of Labor intended that its regulations would authorize benefits where, as here, the claimant does not have pneumoconiosis. Nor was that Congress's intent in establishing the program or in enacting Section 402(f)(2).

For the reasons discussed more fully in our brief in *Pauley* v. *Bethenergy Mines, Inc.*, No. 89-1714, review by this Court is warranted.[1] There is an express conflict in the circuits as to the validity of Labor's third and fourth rebuttal methods, which do not appear on the face of HEW's regulation, and the conflict may affect as many as 3,500 pending cases. The issue is squarely presented here, as in *Pauley*, since the court of appeals held without reservation that Labor's fourth rebuttal method is invalid.

This case is in an interlocutory posture, which normally counsels against review, since the court of appeals remanded for further consideration of whether the employer rebutted the presumption under the second method. But that issue, which was not considered by the Benefits Review Board or the court of appeals, is not presented in the petition. Accordingly, there is no apparent reason why the Court would fail to address the validity of the additional rebuttal methods set forth in Labor's regulation, and hence resolve the conflict in the circuits, by granting review in this case. See R. Stern, E. Gressman & S.

---

[1] We are serving a copy of our brief and of our supplemental brief in *Pauley* on the other parties in this case.

Shapiro, *Supreme Court Practice* 225-226 (6th ed. 1986), and cases cited therein.

Finally, the court of appeals erred by failing to consider whether its construction of Section 402(f)(2) raised a serious due process question. The Director argued that the rebuttal method in issue should be upheld because a holding of invalidity would lead to the irrational result that operators would be required to pay black lung benefits to claimants who do not suffer from black lung disease. Such an irrational result, the Director suggested, might raise a serious due process question. The Director plainly had standing to defend the Department of Labor's regulation in this manner, consistent with the "cardinal principle" that "if a serious doubt of constitutionality is raised * * * this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided." *Public Citizen* v. *United States Dep't of Justice*, 109 S. Ct. 2558, 2572 (1989). That principle is applicable here and was properly raised by the Director in the court below.[2]

[2] The Director's argument on this point is relevant to the first question presented in the petition.

CONCLUSION

The petition for a writ of certiorari should either be granted or held and disposed of as appropriate in light of the disposition of *Pauley* v. *Bethenergy Mines Corp.*, No. 89-1714.[3]

Respectfully submitted.

KENNETH W. STARR
Solicitor General

DAVID L. SHAPIRO
Deputy Solicitor General

CHRISTOPHER J. WRIGHT
Assistant to the Solicitor General

ROBERT P. DAVIS
Solicitor of Labor

ALLEN H. FELDMAN
Associate Solicitor

EDWARD D. SIEGER
Attorney
Department of Labor

SEPTEMBER 1990

[3] This case involves Labor's fourth rebuttal method, and *Pauley* involves the third. We do not believe the two rebuttal methods raise questions that differ in any material respect. But in order to insure that the question of the validity of both methods is definitively resolved, the Court may wish to grant the writ in both cases and to consolidate them for briefing and argument.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1990 262203 20122